

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
  
BEFORE THE ADMINISTRATOR**

<b>In the Matter of</b>	)	
	)	
<b>Rizing Sun, L.L.C.,</b>	)	<b>Docket No. FIFRA-9-2004-0024</b>
	)	
	)	
<b>Respondent</b>	)	

**ORDER GRANTING IN PART COMPLAINANT’S MOTION FOR  
ACCELERATED DECISION ON LIABILITY AND REDUCING THE  
NUMBER OF COUNTS FOR WHICH A PENALTY MAY BE ASSESSED**

**I. Introduction and Procedural Background**

This proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 *et seq.*, was commenced on September 28, 2004, by the filing of a complaint by the Associate Director for Agriculture, Cross Media Division, U.S. Environmental Protection Agency, Region IX (“Complaint” or “EPA”). The complaint charges Rizing Sun, L.L.C. (“Respondent” or “Rizing Sun”) with the distribution and sale of unregistered pesticides in violation of Section 12(a)(1)(A) of FIFRA and the distribution or sale of misbranded pesticides in violation of Section 12(a)(1)(E) of FIFRA. Specifically, the complaint provides a detailed account of inspections conducted at five different retail establishments. The inspections allegedly reveal that the Respondent distributed or sold products marketed as topical flea and tick treatments for dogs and cats. The complaint alleges that these products are unregistered pesticides and are misbranded. For these alleged violations, Complainant proposes to assess Respondent a civil administrative penalty of up to \$5,500 for each violation occurring on or before March 14, 2004, and up to \$6,500 for each violation occurring after March 14, 2004. The penalty initially proposed totals \$357,000. In a supplemental prehearing exchange, Complainant has reduced the penalty sought to \$214,200. The order issued herein concludes that Complainant may not assess a penalty for both the sale and distribution of an unregistered pesticide in violation of FIFRA § 12(a)(1)(A) and for the sale or distribution of a misbranded pesticide in violation of FIFRA § 12(a)(1)(E) for the sale or distribution of the same pesticide.

Respondent acting *pro se* filed an answer by letter, dated November 24, 2004. The letter

denied all the jurisdictional allegations of the complaint and requested a jury trial. By a letter-order, dated, February 15, 2005, the ALJ directed the parties to exchange prehearing information on or before March 11, 2005. Complainant filed his Prehearing Exchange in a timely manner.

Rizing Sun responded by a letter, dated April 22, 2005, which contained arguments as to the legal and factual validity of the complaint. First, Respondent contested EPA's allegation that Rizing Sun distributed an unregistered pesticide (Response at 2). Rather, Rizing Sun asserted that the Frontline product (fipronil) currently manufactured by Merial Limited<sup>1</sup>, was made only in France and was registered with EPA Reg. No. 65331-5 (Est. No. 65331-FR-2), known as "Frontline Plus for Dogs and Cats" and EPA Reg. No. 65331-3 (Est. No. 653310-FR-2), known as "Frontline Top Spot or Spot On for Dogs and Cats".<sup>2</sup> These assertions are supported in part by what appears to be labels or partial labels for "Frontline Spot On Dog", EPA Reg. No. 65331-3, bearing the name of Merial Limited, Duluth, GA and "Frontline Spot On Cat", EPA Reg. No. 65331-2 (Response, Exhs K and L). Respondent denies that Rizing Sun has ever manufactured, repackaged or distributed this product under any other name or modified container. Additionally, Rizing Sun asserts that, to its knowledge, Merial Limited met all the FIFRA registration requirements of 7 U.S.C. § 136(e) [requiring the registration of establishments where pesticides are produced.] (Response at 3).

Rizing Sun asserts that "FIFRA shows no applicable law for the duplication or counterfeiting of a box for retail sale of a package for distribution" in the United States.<sup>3</sup>

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<sup>1</sup>The Complaint alleges that "Frontline Plus For Dogs" and "Frontline Plus for Cats" contain "fipronil" and "(S)-methoprene" as active ingredients and that both "fipronil" and "(S)-methoprene" are insecticides (id. ¶3).

<sup>2</sup>The complaint alleges that Merial produces "Frontline" products at its registered establishments in France (EPA Establishment Number 65331-FR-2), Germany (EPA Establishment Number 65331-DEU-1), and Georgia (EPA Establishment Number 65331-GA-1) for sale within the United States (id. ¶ 1). An EPA Fact Sheet "Retailers and Counterfeit Pet Products" (February 2004) states, inter alia, that EPA, in cooperation with its state partners, is issuing stop, sale, use and removal orders to retailers and other distributors of counterfeit Frontline Top Spot, Frontline Plus and Advantage products for control of fleas and ticks on dogs and cats. (C's Phx L). The Fact Sheet further states that counterfeit versions of the following EPA-registered products have been identified:

1. Frontline Top Spot for Cats (EPA Reg. No. 65331-2)
2. Frontline Top Spot for Dogs (EPA Reg. No. 65331-3)
3. Frontline Plus for Cats (EPA Reg. No. 65331-4)
4. Frontline Plus for Dogs (EPA Reg. No. 65331-5)

Additionally, "Advantage" products and their EPA registration numbers are included in the list of products, which have been counterfeited. The Fact Sheet states that exterior packaging on the counterfeit product looks like the legitimate U.S. product and that the only way to determine whether a product is legitimate or counterfeit is to open the package.

<sup>3</sup> Rizing Sun Appears to have overlooked FIFRA § 2(q) "**Misbranded**" which provides that "(1) A pesticide is misbranded if ... (C) it is an imitation of, or is offered for sale under the

Second, Respondent points to 7 U.S.C. § 136o and argues that, if the “products were imported illegally, it was not by Rizing Sun LLC but through the distributor from whom “we” acquired the product. Rizing Sun identifies the distributor as “Tidalwave Distribution, Inc.”, Torrance, California (Response at 6 and 9). The cited section of FIFRA requires the Secretary of the Treasury to, inter alia, notify the Administrator of the arrival into this country of pesticides and devices and to refuse delivery to the consignee of pesticides or devices determined to be adulterated or misbranded or otherwise not in compliance with FIFRA.<sup>4</sup> Therefore, Rizing Sun argues that the jurisdictional allegations of this complaint would not be with the EPA but with the Secretary of the Treasury and are the responsibility of U.S. Customs. Third, Respondent asserts that the labeling accurately represented the contents of the package and was not misleading in any way. Respondent also challenges EPA’s claims that the labels were printed in a foreign language.<sup>5</sup> Rizing Sun states that all language and labeling were understandable and in English (Response at 7). Further, it notes that the metric system is a unit of measurement and not a foreign language. Respondent alleges that all products sold by Rizing Sun, LLC were labeled with the registration number as required by [§] 136e [concerning registration of pesticide producing establishments] and that we can find no reference in FIFRA that mentions how the

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name of another pesticide. “In addition, FIFRA §14(b) is entitled “Criminal penalties”, and ¶ (1)(B) provides: Any commercial applicator of a restricted use pesticide, or any other person not described in subparagraph (A) who distributes or sells pesticides or devices, who knowingly violates any provision of this subchapter shall be fined not more than \$25,000 or imprisoned for not more than 1 year, or both.” Rizing Sun is included within the “any other person” language of the quoted section of the statute. See the paragraph entitled “Penalties for Selling Counterfeit Products”, EPA Fact Sheet (supra note 1 at 1).

<sup>4</sup>FIFRA § 17, 7 U.S.C § 136o, is entitled “Imports and Exports” and ¶ 136o( c ) “Importation of pesticides and devices” provides in pertinent part: The Secretary of the Treasury shall notify the Administrator of the arrival of pesticides and devices and shall deliver to the Administrator, upon the Administrator’s request, samples of pesticides or devices which are being imported into the United States, giving notice to the owner or consignee, who may appear before the Administrator and shall have the right to introduce testimony. If it appears from the examination of a sample that it is adulterated, or misbranded or otherwise violates the provisions set forth in this subchapter, or is otherwise injurious to health or the environment, the pesticide or device may be refused admission, and the Secretary of the Treasury shall refuse delivery and shall cause the destruction of any pesticide or device which shall not be exported within 90 days from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe. The Secretary of the Treasury may deliver to the consignee of such pesticide or device pending examination and decision in the matter on execution of bond for the amount of the full invoice of such pesticide or device, together with the duty thereon, and on refusal to return such pesticide or device for any cause to the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of said bond...

<sup>5</sup>The EPA Fact Sheet refers to foreign languages, i.e., most likely French or German, on product tubes of “Advantage” product (id. 3). No mention is made of foreign languages on the labels of Frontline products.

label is to be applied or the mention [that] the unit of measurement be strictly in U.S. pounds (Response at 6). Rizing Sun overlooks or ignores the fact that the labeling requirements of the regulation, 40 C.F.R. Part 156, Subpart A, provide that the net content statement of liquid pesticides shall be expressed in conventional American units of fluid ounces, pints, quarts and gallons <sup>6</sup> and that the net content statement of pesticides which are solid, or semi-solid, viscous or pressurized, or a mixture of liquid and solid, shall be in terms of weight expressed as avoirdupois pounds and ounces.<sup>7</sup> It is noted that the label for “Frontline Top Spot for Dogs” states “contains 3-0.045 fl oz (1.34 ml) applicators” (Response, Exh G). See also the label for “Domestic Frontline Top Spot Medium Dog” (Response, Exh A), which depicts applications for the product and, although not all of the content statement was reproduced in copying, appears to confirm the .045 fl. oz content of the applicators.

Respondent defines “counterfeit” as “[t]o make a copy of, usually with intent to defraud; forge; counterfeits money “and denies that the products at issue are counterfeit (Response at 6). According to Respondent, only the re-boxed packaging is counterfeit.<sup>8</sup> It is noted, however, that one of the indicia of a legitimate Frontline U.S. product stated in the Fact Sheet is that applicator net contents are in fluid ounces rather than metric, i.e., *ml* (id.3). Respondent maintains that the

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<sup>6</sup>Section 156.10(d) provides in part: (2) If the pesticide is a liquid, the net content statement shall be in terms of liquid measure at 68 degrees F (20 degrees centigrade) and shall be expressed in conventional American units of fluid ounces, pints, quarts and gallons.

<sup>7</sup>Section 156.10(d) provides in part: (3) If the pesticide is solid or semi-solid, viscous or pressurized, or is a mixture of liquid and solid, the net content statement shall be in terms of weight expressed as avoirdupois pounds and ounces.

<sup>8</sup>Although no copy of the EPA approved labeling is in the record, the complaint alleges that the labeling accepted by EPA in connection with the registration of “Frontline Top Spot for Dogs”, Frontline Top Spot for Cats”, “Frontline Plus for Dogs”, and “Frontline Plus for Cats” consists of:

A. An outer retail carton bearing directions for use, a statement of ingredients, and other information.

B. A pamphlet insert bearing directions for use.

C. A reapplication card.

D. A child resistant blister package containing either three or six product applicators.

Each product applicator bears, among other information:

- i. the product name;
- ii. the size of the product in U.S. customary units of volume (i.e. fluid ounces);
- iii. name and percentage by weight of active ingredient;
- iv. EPA registration number;
- v. reference statement referring users to the main labeling on the outer cartons; and
- vi. company name and lot number. (Complaint at ¶ 6).

packages contain exactly the ingredients listed and that it never repackaged the product.<sup>9</sup> Rather, Respondent alleges that a Hawaiian corporation, Pang & Sons, Inc., repackaged the material that Pang & Son was investigated by U.S. Customs and has agreed to pay a criminal penalty of \$10,000 payable over two years. Respondent also alleges that EPA fined Pang & Son, but that a proposed civil penalty of \$341,000 has not been paid. Additionally, Respondent states that Tidalwave Distribution, Inc., Torrance, California, which was responsible for mass distribution of the products at issue not only to Rizing Sun, but also to 18 other U.S. companies, has, without either admitting or denying liability, agreed to pay a penalty of \$50,000 for selling and distributing unregistered and misbranded products.

Lastly, Respondent claims an inability to pay the civil penalty, alleging that the proposed penalty would cause Rizing Sun to go out of business. Respondent alleges that his main income is from real estate sales and that his wife was in a car accident several months before the birth of their three-month old child and cannot return to work. He says that he has forwarded numerous personal medical bills to Mr. Kim, EPA counsel, explaining that he cannot afford to pay any civil penalty. Rizing Sun states that it is no longer selling the repackaged products, but points out that there are companies that are. Respondent says that it is no longer purchasing from Tidalwave Distribution, Inc. or selling any product that we cannot verify was legally imported from France for U.S. distribution. Arguing for mitigation of the penalty, Respondent asserts that it has no history of prior violations, that all [retailers] in the complaint were issued a full refund for any product considered to be in violation of FIFRA and that any violations of FIFRA were inadvertent. Therefore, Respondent requests that the ALJ issue a warning or, as an alternative, significantly reduce the penalty below the \$10,000 criminal penalty paid over two years by Pang & Sons, Inc.

On November 4, 2005, Complainant filed a Motion for Accelerated Decision on Liability and a Memorandum in Support thereof ("Memorandum"). Although the Memorandum acknowledges that Respondent denied all the jurisdictional allegations of the complaint, Complainant asserts that there is no genuine issue of material fact which would preclude a judgment on liability. Complainant maintains that it has adequately established that the Respondent is a "person," that the products at issue are "pesticides," that Respondent "distributed or sold" the pesticides at issue in 31 transactions, that the pesticides were "unregistered," and that the pesticides were "misbranded".

Rizing Sun did not respond to the Complainant's Motion for Accelerated Decision.

## **II. Facts**

Rizing Sun, L.L.C. is a Nevada corporation that owns, operates, and is responsible for a business in Peoria, Arizona. Rizing Sun engages in the sale and distribution of various products for the control of fleas and ticks on dogs and cats.

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<sup>9</sup>Of course, if Rizing Sun distributed or sold an unregistered or misbranded pesticide, it violated the Act irrespective of whether it repackaged the product.

On February 17, 2004, an inspector from the Hawaii Department of Agriculture (“HDA”) inspected City Feed, Inc. (“City Feed”).<sup>10</sup> The HDA inspector, Raynette N.Y. Ching, hand-delivered to City Feed’s President, Mr. Raymond M. Sato, a Stop Sale, Use and Removal Order (“SSURO”) for Advantage and Frontline products offered for sale and suspected of being unregistered and misbranded. It developed that City Feed does not sell Advantage Products. ([Inspection] Narrative, C’s Phx Exh C). Ms. Ching sampled, by taking photographs, of three of seven Frontline products offered for sale by City Feed, i.e., Frontline Plus for Dogs (45-88 lbs.), EPA Reg. No. 65331-5; Frontline Plus for Cats, EPA Reg. No. 65331-4, and Frontline Spot on Dog (0-10 kg.), EPA Reg. No. 65331-3. Mr. Sato stated that these products were purchased from Rizing Sun and provided supporting invoices. Mr. Sato signed three Dealer’s Statements verifying for each product that he had supplied the invoices. EPA contends that the products lack a child-resistant blister package for the applicators, lack EPA registration numbers, contain directions for use in a foreign language, and identify the contents in metric measure instead of fluid ounces. Because the photos and the Inspection Narrative identify EPA registration numbers, Complainant’s assertion that the products lack an RPA registration number clearly requires explanation.

On February 18, 2004, HDA inspector Melvin Tokuda, inspected Pets Plus<sup>11</sup> to investigate the sale and distribution of unregistered pesticides. (C’s Phx Exh B). He delivered the SSURO involving Frontline and Advantage products issued by EPA to the person interviewed, Stacy Sterrett. Inspector Tokuda sampled by taking photographs of Frontline Plus for Cats (EPA Reg. No. 65331-4), Frontline Plus for Dogs (11-22 lbs.), EPA Reg. No. 65331-5; Frontline Plus for Dogs (23-44 lbs.), EPA Reg. No. 65331-5; Frontline Plus for Dogs (45-88 lbs) EPA Reg. No. 65331-5; Frontline Plus for Dogs, 40 to 60 kg, EPA Reg. No. 6331-5; Frontline Plus for Dogs (89-132 lbs.), EPA Reg. No. 65331-5 and Frontline Plus for Dogs (20-40 kg), EPA Reg. No. 65331-5. The establishment number, EPA 65331-FR-2, indicates that the products were made in France. HDA conducted a follow-up inspection on April 20, 2004. During this inspection, Stanley Uyehara, manager of Pets Plus, traced the products to Rizing Sun and supplied an invoice, dated November 28, 2003, verifying the purchase. Mr. Uyehara also signed five Dealer’s Statements verifying that each of the mentioned products was obtained from Rizing Sun. Based on the data obtained during the two inspections, EPA alleges that Respondent distributed or sold products that were unregistered for sale within the United States and misbranded in five separate transactions. Specifically, Complainant asserts that the products lack a child resistant blister package for the applicators, lack the EPA registration number, contain directions for use in a foreign language, and identify the contents in metric measure instead of fluid ounces. Once more, the mentioned Frontline products and the photos specify EPA registration numbers and, the assertion that such numbers are lacking requires explanation. Additionally, the foreign language in which directions for use were printed has not been identified. Moreover, the Investigation Summary for each of these products refers to the number of boxes available for sale [containing] three of six [applicators] per box and the capacity of the

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<sup>10</sup>C’s Phx Exh C. City Feed is located at 1827 South Beretania Street, Honolulu, Hawaii.

<sup>11</sup>Pets Plus is located at 250 Ward Avenue, Honolulu, Hawaii.

applicators is expressed in fluid ounces (C's Phx Exhs I and J).

A HDA inspector, Steven S. Ogata, inspected Mililani Pets, Inc. ("Mililani") located in Mililani, Hawaii,<sup>12</sup> on February 18, 2004, (C's Phx Exh A). The reason for the inspection was to hand-deliver an SSURO issued by EPA for Frontline and Advantage products purchased from Pang & Son, L.L.C. ([Inspection] Narrative). Frontline and Advantage products purchased from Pang & Son were not found in the store. Mr. Ogata took photographic samples of Frontline Plus for Dogs (11-22 lbs.), Frontline Plus for Dogs (23-44 lbs.), Frontline Plus for Dogs (45-88 lbs.), Frontline Plus for Dogs (89-132 lbs.), Frontline Plus for Cats, and Frontline Top Spot for Dogs (0-22 lbs.). During the inspection, the President of Mililani, David M Ferreira, produced three invoices indicating Mililani purchased the products from Rizing Sun. Mr. Ferreira also signed six Dealer's Statements, verifying that the mentioned products were purchased from Rizing Sun. Complainant alleges that the invoices and statement prove that there were six transactions. An invoice, dated December 29, 2003, indicates that Respondent distributed or sold Frontline Plus for Dogs, for dog sizes of SM, MED, LG and XL to Mililani on that date. A second invoice, dated January 13, 2004, indicates that Rizing Sun distributed or sold to Mililani Frontline Top Spot 3 Pack SM Dog, Frontline Plus 3 pack Cat, and Frontline Plus 3 Pack MED Dog. A third invoice, dated January 21, 2004, indicates that Rizing Sun distributed or sold to Mililani Frontline Plus 3 Pack SM Dog and Frontline Plus 3 Pack LG Dog. The fourth invoice, dated February 6, 2004, indicates that Rizing Sun distributed or sold Mililani Frontline Top Spot 3 Pack SM Dog, Frontline Plus 3 Pack SM Dog, Frontline Plus 3 Pack MED Dog, and Frontline Plus 3 Pack LG Dog. Complainant alleges that the products lack a child resistant blister package for the applicators, lack EPA registration numbers, contain directions for use in a foreign language, and identify the contents in metric measure instead of fluid ounces.

On May 7, 2004, the Pennsylvania Department of Agriculture ("PDA") inspected Krazy A Shop ("Krazy A") in response to an EPA Referral.<sup>13</sup> PDA Inspector Jeffrey W. Bastian took photographic samples of Frontline Plus for Dogs, EPA Reg. No. 65331-5 and Frontline Spot on Dog, EPA Reg. No. 65331-3 (Exhs O, P, R and S). The owner of Krazy A, Betty D. Allen, provided an invoice indicating that the products were purchased from Rizing Sun, L.L.C. and signed a Dealer's Statement. According to Inspector Bastian, Mrs. Allen presented him with three different opened Frontline product packages, which she believed to contain counterfeit product (C's Phx Exh D). Mr. Bastian states, however, that none of the Frontline and Advantage products, which were observed and offered for sale on May 7, 2004, appeared to be counterfeit (Memorandum, dated May 12, 2004). Mrs. Allen had used two of the packages herself and the third one was returned by a customer. In her Dealer's Statement, Mrs. Allen states that she removed all the Frontline products purchased from Rizing Sun in response to a customer's complaint. Complainant contends that the product is unregistered and misbranded because it lacks a child resistant blister package for the applicators, lacks the EPA registration number, contains directions for use in a foreign language, and identifies the contents in metric measure

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<sup>12</sup>Mililani is located at 95-221 Kipapa Drive, Mililani, Hawaii.

<sup>13</sup>C's Phx Exh D. The address of Krazy A is 526 Old West Creek Road, Emporium, Pennsylvania.

instead of fluid ounces.

The Georgia Department of Agriculture (“GDA”) inspected Acworth Feed<sup>14</sup> on July 15, 2004 (C’s Phx Exh E). GDA Inspector Pamela K. Ackerman took photographs of Frontline Plus for Dogs (0-10 kg.), Frontline Plus for Dogs (10-20 Kg.), Frontline Plus for Dogs (20-40 kg.), Frontline Plus for Dogs (40-60 kg.), Frontline Spot on Dog (0-10 kg.), Frontline Spot on Dog (10-20 kg.), Frontline Spot on Dog (20-40 kg.), Frontline Spot on dog (40-60 kg.), and Frontline Plus for cats. Mark Tatum, the owner of Acworth Feed indicated that the products were bought from Rizing Sun and supplied three invoices verifying the purchase. He also signed a Dealer’s Statement. The inspector’s statement (“Marketplace Narrative”) indicates that she placed all unregistered pesticides under an SSURO.... Complainant asserts in its complaint that the products were intended for distribution in either Australia or the United Kingdom. EPA bolsters this assertion by pointing out that the net contents are expressed in metric measure and contained directions for use in languages different than those required in the United States.

### **III. Complainant’s Arguments in Support of Motion For Accelerated Decision on Liability**

Complainant asserts that it is entitled to accelerated decision, and that no genuine issues of material fact exist as to Respondent’s liability. Complainant supports its argument with admissions in Respondent’s April 22, 2005, letter, inspection reports, declarations from state inspectors, and enforcement case reviews issued by the EPA’s Office of Pesticide Programs (“OPP”).

Complainant argues that Rizing Sun is incorporated in Nevada and therefore a “person” within the meaning of Section 2(s) of FIFRA, 7 U.S.C. § 136(s).<sup>15</sup> EPA further argues that FIFRA applies to the Frontline products at issue because they are pesticides.<sup>16</sup> The products are used to kill, mitigate, or control pests and make claims to do so on the packaging.

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<sup>14</sup>Acworth Feed is located at 5000 Acworth Road, Acworth, Georgia.

<sup>15</sup>Under FIFRA, a person means “means any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.” 7 U.S.C. § 136(s).

<sup>16</sup>FIFRA section 2(u), 7 U.S.C. § 136(u), provides in pertinent part that the definition of pesticide includes “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” Additionally, 40 C.F.R. § 152.15 characterizes a pesticide as “any substance (or mixture of substances) intended for a pesticidal purpose, i.e., use for the purpose of preventing, destroying, repelling, or mitigating any pest.” Case law also establishes that a product is a pesticide within the meaning of FIFRA, if labeling of the product or accompanying literature make pesticidal claims. *N. Jonas & Co., Inc. V. U.S.E.P.A.*, 666 F.2d 829 (3d Cir. 1981)(finding pesticidal status where a reasonable consumer would use a product as a pesticide given the label, advertising representations, and the collectivity of the circumstances); *Hing Mau, Inc.*, Docket No. FIFRA-9-2001-0017, 2002 EPA ALJ LEXIS 49m \*13 (August 13, 2002); see also 40 C.F.R. § 152.15.



EPA also alleged that Respondent sold or distributed the Frontline products in thirty-one separate transactions from September 23, 2003 to July 7, 2004. Relying on the invoices provided by vendors and inspection reports, EPA argues that Respondent engaged in three transactions with City Feed, six transactions with Mililani, five transactions with Pets Plus, one transaction with Krazy A, and eight [16] transactions with Acworth Feed.

#### **A. Complainant's Argument in Support of Section 12(a)(1)(A) Violations**

Complainant contends that the pesticides at issue were not registered as required by FIFRA. EPA points to two Enforcement Case Reviews ("ECRs") issued by OPP, dated March 10, 2005, and May 3, 2005. Although Complainant acknowledges that there are registered forms of these pesticides, Complainant says that the ECRs demonstrate that all fourteen pesticide Frontline products were not registered for sale within the United States. See Exhibits I and J. Complainant alleges that the ECRs find three different types of unregistered pesticides:

The fourteen products can be divided into three distinct categories of unregistered pesticides: (1) counterfeit pesticides that imitate products registered for sale within the U.S. in outer packaging (i.e. cartons) but contain product applicators apparently extracted from foreign products that are not encased in child resistant packaging and carry labeling with foreign languages and metric measures of net contents (nine products sampled by Pamela K. Ackerman of GDA and analyzed in the March 10 and May 3, 2005 ECRs)... (2) pesticides purely intended for foreign consumption (six products sampled by Steven S. Ogata of HDA and analyzed the March 10, 2005 ECRS and five products sampled by Melvin Tokuda of HDA and analyzed in the May 2, 2005 ECRs)... and (3) pesticides intended for foreign consumption whose outer cartons were restickered with EPA registration numbers and other information (three products sampled by Raynette N.Y. Ching of HDA and analyzed in the May 3, 2005 ECRs).

Memorandum at 9-10. In addition, Complainant cites an affidavit from Glenda Dugan, a Life Scientist from the Pesticides Section of the Cross Media Division of EPA Region IX (C's Phx Exh M.). The affidavit, dated March 7, 2005, states that Rizing Sun to date has never been registered with EPA to produce any pesticide product.

#### **B. Complainant's Argument in Support of Section 12(a)(1)(E) Violations**

To support its allegations of a Section 12(a)(1)(E) of FIFRA violations, Complainant contends that OPP in both ECRs determined that all of the Frontline products were misbranded.<sup>17</sup> Exhibits I and J. First, Complainant argues that some of the products are

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<sup>17</sup>Section 2(q) of FIFRA, 7 U.S.C. § 136(q) states, in pertinent part:

misbranded because the inner contents were intended for sale in foreign countries even though the outer packaging demonstrated registration for sale within the United States. EPA refers to the March 10, 2005 ECRs which shows that OPP concluded that the five Frontline Plus products inspected by Pamela K. Ackerman of GDA were intended for sale in Australia and contained numerous labeling deficiencies, including missing first aid statements, inadequate or missing directions for use, or listing an emergency telephone number that does not work in the United States. In addition, OPP determined that these products were not encased in the appropriate child resistant packaging. In the May 3, 2005 ECRs, OPP determined that the remaining four Frontline Spot on Dog products examined by Pamela K. Ackerman of GDA were intended for sale in Great Britain and also lacked child resistant packaging.

Second, Complainant argues that certain Frontline products were misbranded in violation of Section 12(a)(1)(E) because they contained labeling deficiencies and counterfeit products. Specifically, Complainant argues that the outer cartons of these products may be in compliance but the labeling and packaging of inside the box violate FIFRA. As an example, EPA points to the March 10, 2005 ECR conclusions about the six Frontline products viewed by Steven S. Ogata of HDA in Mililani during February 18 and 20, 2004. OPP determined that those products contained packaging labels that were consistent with approved forms. OPP observed that “Some, but not all, of the samples presented for review were missing a key part of the label: a paper insert which bears the Precautionary statements, including Hazards to humans and domestic animals, a statement Do not reapply for 30 days, Storage and Disposal Statements, and Physical and Chemical Hazards statements.” Exhibit I at 2. Further, OPP also found that all Frontline products in this group did not contain the approved child resistant packaging and that the foil package inserts did not match the label accepted with the registration. OPP calls attention to the statement “usage veterinaire” on the foil labels and explains that the language is typical in products manufactured for sale outside of the United States. Complainant then points out that “OPP reached similar conclusions regarding the five counterfeit products sampled by Melvin Tokuda in his February 18 and 20, 2004 inspections at Pet Plus. See Exhibit J at 2-3. Such conclusions are also applicable to the allegedly counterfeit product sampled by Jeffery W. Bastian in his May 7, 2004 inspection of Krazy A. See Exhibits D, G. Memorandum at 14.

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- “(1) A pesticide is misbranded if --
- (A) its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;
  - (B) it is contained in a package or other container or wrapping which does not conform to the standards established by the Administrator pursuant to Section 25(c)(3).
  - (C) it is an imitation of, or is offered for sale under the name of, another pesticide
  - (D) its label does not bear the registration number assigned under Section 7.”

Lastly, Complainant alleges that certain Frontline goods are misbranded because they are foreign products whose outer cartons were restickered with labels exhibiting the EPA registration number and ingredients. Complainant points to the May 3, 2005 ECR conclusion regarding the three products inspected by Raynette N.Y. Ching for the HDA at City Feed. The ECRs determined that the products are typical of those manufactured for Australian markets but also have stickers containing EPA registration information and excerpts from United States labels. Exhibit J at 3. In addition, OPP notes that:

These products are misbranded in that they each display two separate ingredients statements, both of which differ from the ingredient statement for the U.S. registered products. In addition, they bear no net contents statements on the exterior packaging, contain false and misleading safety, efficacy and drug claims, and their 'Directions for Use' do not explain how to apply the product. They display emergency and information telephone numbers that will not work in the U.S.

Exhibit J at 3-4. The ECRs point out that the labels either obscured or presented contradictory information. The ECRs also indicate that the product lacked child resistant packaging.

### **C. Complainant's Argument That Section 12(a)(1)(A) and (E) Are Independent**

Complainant asserts that "FIFRA does not make any violation of Section 12(a)(1)(A) dependent upon any violation of Section 12(a)(1)(E), or vice versa." Memorandum at 15. EPA argues that the plain meaning of FIFRA Section 12(a)(1) allows a single transaction of sale or distribution to violate both Sections 12(a)(1)(A) and (E). Specifically, Complainant argues that these sections are not mutually exclusive because both are prefaced by the words "any pesticide." Also, Complainant cites legislative history of the statute which indicates that labeling requirements for pesticides originated in the Insecticide Act of 1910, while requirements for registration of pesticides were not inaugurated until the enactment of FIFRA of 1947. Additionally, Complainant points out that certain pesticides are exempt from registration requirements but that no such exemption exists for labeling requirements. Finally, Complainant quotes language from *Avril*, which states "The violations of selling an unregistered pesticide and of selling a pesticide that is misbranded are not dependent on each other and may properly be charged separately for each shipment. *Avril, Inc.*, Docket No. I.F. & R. III-441-C (March 24, 1997).

## **IV. Standard For Considering A Motion for Accelerated Decision**

Under the Consolidated Rules of Practice governing the proceeding, an Administrative Law Judge may render an accelerated decision in favor of a party as to any or all part of a proceeding if no genuine issue of material fact exists and if that party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). The standard for granting a motion for accelerated decision is analogous to that of a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Green Thumb Nursery, Inc.*, 6 E.A.B. 782 (E.A.B. 1977); *CWM Chem. Serv.*, 6 E.A.D. 1, 12 (E.A.B. 1995); *Hing Mau, Inc.*, Docket No. FIFRA-0-2001-0017, 2002 EPA ALJ LEXIS 49, \*11 (August 13, 2002); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251

(1986)(explaining that the threshold question for a summary judgment is whether there are any genuine factual issues that can only be resolved by a judicial fact-finder). It is well-established that the evidence must be viewed in a light most favorable to the non-moving party, which is the Respondent in this case. *Adickes v. S.H. Kress Co.*, 389 U.S. 144, 158-159 (1970).

## **V. Discussion**

Complainant's Motion for Accelerated Decision on Liability requests that the ALJ find that there is no genuine issue of material fact regarding liability. To establish legal responsibility, Complainant must show that the Respondent is a person that distributed or sold products that are pesticides. To satisfy the requirements of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), EPA must also show that Respondent distributed or sold a pesticide that is not registered.<sup>18</sup> To prove a FIFRA section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), violation, EPA must show that Respondent distributed or sold a pesticide that is misbranded.<sup>19</sup> Complainant contends that it has adequate documentation to satisfy these elements.

### **A. The Section 12(a)(1)(A) Allegation**

Complainant has failed to show that there are no genuine issues of material fact regarding whether the Frontline products are registered. Unlike the majority of proceedings involving the alleged sale or distribution of registered pesticides which are not registered, the same products at issue here bear EPA registration numbers. Although Complainant repeatedly asserts that the products distributed by Rizing Sun are not the products registered by EPA, this obviously involves factual questions which should not be resolved absent as a minimum EPA approved labels in the record. As noted above, the only detailed description of the EPA approved labeling is in the complaint. Respondent's April 22, 2005 letter contests the allegation that the Frontline products constitute registered pesticides which are not registered. Further, Rizing Sun asserts that Merial Limited, the registrant, fulfilled all the FIFRA registration requirements and that the Frontline products contained ingredients that were registered with the EPA. The affidavit from Glenda Dugan does state that Respondent has never been registered as a pesticide producer by EPA (C's Phx Exh M). This affidavit does not address whether the products themselves were registered. Further, both the March and May ECRs indicate that Frontline products were registered and assigned EPA registration numbers under the name of Merial Limited. See e.g. Exhibit I at 17, Exhibit J at 6. Viewing the circumstances in a light most favorable to Respondent, there are material issues of fact as to whether the Frontline products sold and distributed by Rizing Sun were registered pesticides. Moreover, while it is clear that a registered pesticide may be misbranded, the facts herein raise the issue of at what point the misbranding as

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<sup>18</sup>Section 12(a)(1)(A) makes it unlawful for a person to sell or distribute "any pesticide that is not registered under Section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter." 7 U.S.C. § 136j(a)(1)(A).

<sup>19</sup>Section 12(a)(1)(E) provides that it is unlawful for a person to sell or distribute "any pesticide which is adulterated or misbranded." 7 U.S.C. § 136j(a)(1)(E).

to labeling or packaging becomes so extensive that the product sold or distributed is not the product registered by EPA and hence a pesticide which is not registered. This indicates that the sale or distribution of a registered pesticide which is not registered or of a misbranded pesticide in the same transaction or shipment may not be an independent violation as Complainant contends.

## **B. The Section 12(a)(1)(E) Allegation**

Complainant has provided sufficient evidence to establish that Respondent distributed or sold misbranded pesticides in violation of Section 12(a)(1)(E) of FIFRA. EPA has adequately established that (1) Respondent is a “person” within the meaning of FIFRA; (2) the Frontline products at issue are pesticides within the purview of the statute; and (3) that each of the Frontline products sampled during the multiple inspections are misbranded within the meaning of FIFRA.

### **1. Respondent is a “Person”**

Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a person as “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.” Respondent is a Nevada corporation and therefore this requirement is fulfilled (C’s Phx Exh K).

### **2. The Frontline Products at Issue Are “Pesticides”**

A product used to prevent or control a pest is a pesticide.<sup>20</sup> FIFRA section 2(u), 7 U.S.C. § 136(u), provides that the definition of pesticide includes “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.”<sup>21</sup> Additionally, 40 C.F.R. § 152.15 characterizes a pesticide as “any substance (or mixture of substances) intended for a pesticidal purpose, i.e., use for the purpose of preventing, destroying, repelling, or mitigating any pest.” Case law also establishes that a product is a pesticide within

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<sup>20</sup>The term “pest” is statutorily defined as “(1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section 25(c)(1).” 7 U.S.C. § 136(t). In turn, 40 C.F.R. § 152.5 makes clear that an insect that is deleterious to man in the environment qualifies as a pest.

<sup>21</sup>The definition of pesticide is “(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substance intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer, except...any article that is a ‘new animal drug’ ...or that is an animal feed.... The term ‘pesticide’ does not include liquid chemical sterilant products (including any sterilant or subordinate disinfectant claims on such products) for use on a critical or semi-critical device...”

the meaning of FIFRA when the labeling of the product or accompanying literature make pesticidal claims. *N.Jonas & Co., Inc. V. U.S. E.P.A.*, 666 F.2d 829 (3d Cir. 1981)(finding pesticidal status where a reasonable consumer would use a product as a pesticide given the label, advertising representations, and the collectivity of the circumstances); *Hing Mau* at \*13; see also 40 C.R.R. § 152.15.

Complainant asserts that the following products are pesticides and therefore subject to FIFRA requirements: (1) Frontline Plus for Dogs (0-10 kg.); (2) Frontline Plus for Dogs (10-20 kg.); (3) Frontline Plus for Dogs (20-40 kg.); (4) Frontline Plus for Dogs (40-60 kg.); (5) Frontline Plus for Dogs (11-22 lbs.); (6) Frontline Plus for Dogs (23-44 lbs.); (7) Frontline Plus for Dogs (45-88 lbs.); (8) Frontline Plus for Dogs (89-132 lbs.); (9) Frontline Plus for Cats; (10) Frontline Spot on Dog (0-10 kg.); (11) Frontline Spot on Dog (10-20 kg.); (12) Frontline Spot on Dog (20-40 kg.); (13) Frontline Spot on Dog (40-60 kg.); and (14) Frontline Top Spot for Dogs (0-20 lbs.). Each of these products is used to prevent or control fleas and ticks on domestic pets. Fleas and ticks are insects and therefore are “pests” within the meaning of Section 2(t), 7 U.S.C. § 136(t), and 40 C.F.R. § 152.5. In addition, these products constitute pesticides because the packaging makes pesticidal claims and a reasonable consumer would use them for pesticidal purposes. The front of the box states “Kills fleas, flea eggs, & ticks,” “Kills fleas & ticks,” or purports to achieve some form of pest control. See, e.g., Exhibit A. Thus, these products are pesticides because they act as and are represented for use as a form of pest control.

### **3. Respondent Distributed or Sold the Products At Issue**

Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), states that the “term” ‘to distribute or sell’ means to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.” The Code of Federal Regulations definition of “distribute or sell” is very similar.<sup>22</sup>

Complainant has established that Respondent distributed and sold each of the products at issue in 31 separate transactions. Complainant has provided both invoices and Dealer’s Statements which trace purchases of the Frontline products to Rizing Sun. HDA Inspector Raynette N.Y. Ching obtained Dealer’s Statements and invoice #1578 that demonstrate City Feed’s purchase of Frontline Plus for Dogs (45-88 lbs.), Frontline Plus for Cats, and Frontline Spot on Dog (0-10 kg.) from Respondent. Exhibit C. The president of Mililani provided Steven S. Ogata of HDA with six Dealer’s Statements and three invoices which show that Respondent distributed or sold Frontline Plus for Dogs (11-22 lbs.), Frontline Plus for Dogs (23-44 lbs.), Frontline Plus for Dogs (45-88 lbs.), Frontline Plus for Dogs (89-132 lbs.), Frontline Plus for

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<sup>22</sup>The Code of Federal Regulations makes clear that the term “distribute or sell”, and any derivation of the term, “means the acts of distributing, selling, offering for sale, holding for sale, shipping, holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any State.” 40 C.F.R. § 152.3.

Cats, and Frontline Top Spot for Dogs (0-22 lbs.). Exhibit A (invoices #2039, 2119, 2215). The manager of Pets Plus provided the HDA with Dealer's Statements and an invoice that establish that the company purchased Frontline Plus for Dogs (11-22 lbs.), Frontline Plus for Dogs (23-44 lbs.), Frontline Plus for Dogs (89-132 lbs.), and Frontline Plus for Cats from Respondent on November 28, 2003. Exhibit B (invoice #1915). The PDA inspector was able to obtain proof of distribution or sale of Frontline Plus for Dogs (45-88 lbs.) by the Respondent on September 23, 2004. Exhibit D (invoice #1447). Finally, GDA Inspector Pamela K. Ackerman received three invoices and a Dealer's Statement from the owner of Acworth Feed, which show that purchases of Frontline Plus for Dogs (0-10 kg.), Frontline Plus for Dogs (10-20 kg.), Frontline Plus for Dogs (20-40 kg.), Frontline Plus for Dogs (40-60 kg.), Frontline Spot on Dog (0-10 kg.), Frontline Spot on Dog (10-20 kg.), Frontline Spot on Dog (20-40 kg.), and Frontline Spot on Dog (40-60 kg.) from the Respondent. Exhibit E (invoices #2378, 3405, and 3408).

#### **4. The Frontline Products are Misbranded Within the Meaning of FIFRA**

The term "misbranded" is broad in scope. Section 2(q) of FIFRA, 7 U.S.C. § 136(q), in pertinent part, defines the term in the following way:

- (1) A pesticide is misbranded if--
  - (A) its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;
  - (B) it is contained in a package or other container or wrapping which does not conform to the standards established by the Administrator pursuant to Section 25(c)(3)
  - (C) it is an imitation of, or is offered for sale under the name of, another pesticide;
  - (D) its label does not bear the registration number assigned under section 7 to each establishment in which it was produced;
  - (E) any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon ...
  - (F) the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 3(d) of this Act, are adequate to protect health and the environment.

Thus, a pesticide is misbranded if the pesticide packaging contains any erroneous labeling or misleading information. Respondent's April 22, 2005 letter contends that all labeling is representative of the product ingredients, is not misleading in anyway, and conforms to EPA standards.

Complainant has provided adequate evidence to show that there is no genuine issue of material fact the Frontline products are misbranded. Complainant has provided detailed

photographic samples and ECRs that demonstrate that the Frontline products deviated from FIFRA requirements.

EPA asserts that the six Frontline products inspected by Steven S. Ogata of HDA contain label deficiencies that render them misbranded. In the March 10, 2005 ECRs, OPP concluded that “Some but not all, of the samples ... were missing a key part of the label: a paper insert which bears the Precautionary statements, including Hazards to humans and domestic animals, a statement Do not reapply for 30 days, Storage and Disposal Statements, and Physical and Chemical Hazards statements.” Exhibit I. However, while the ECRs describe the contents of each label, the photographic samples do not include legible copies of the paper inserts or the parts of the back of the box which would contain warning statements.

In addition, the March 10, 2005 and May 3, 2005, ECRs assert that all of the Frontline products at Mililani, City Feed, Pets Plus, and Krazy A are misbranded because they are in non-approved blister packaging. OPP stated that “Frontline products registered in the U.S. are required to be packaged in child resistant packaging (“CRP”). The sample package inserts do not have the notched edge characteristic of the CRP for this registration, examples of which are on file with the agency.” Exhibit I at 2. Respondent in its April 22, 2005 letter asserts that the tubes containing pesticides were individually sealed in foil poison prevention packages (id. 5.).

Further, Complainant asserts that the Frontline products are misbranded because there are directions for use that are in a foreign language. Specifically, OPP states that “the sample foil package insert labeling does not match the label accepted as part of this registration. Rather, the sample f[o]il package label bears a striped graphic and the statement AD US vet - usage veterinaire.” Exhibit I at 2. Respondent argued that all words and labeling were understandable and in English. Respondent also objected to any allegations that the contents were written in a foreign language. The Code of Federal Regulations makes clear that all label texts must be in English. 40 C.F.R. § 156.10(a)(2)(ii)(C)(3). The regulations do provide, however, that an additional language may be applied equally to the English text if it is considered necessary to protect the public. *Id.* Review of the photographic samples shows that text on the back of the foil package alternates between “FOR VETERINARY USE” and “AD US VET USAGE VETERINAIRE.” The directions for use are in both English and another language. Further, the directions are applied equally.

The Code of Federal Regulations defines child-resistant packaging as packaging that is designed and constructed to be significantly difficult for children under 5 years of age to open or obtain a toxic or harmful amount of the substance contained ... and that is not difficult for normal adults to use properly.” 40 C.F.R. § 157.21(b). For the pesticide products that are required to be in child-resistant packaging, the registrant must certify to EPA that the packaging meets all child resistant packaging requirements. 40 C.F.R. § 157.34. Here, the products distributed fail to meet that requirement.

All of the Frontline products inspected by Pamela K. Ackerman of GDA and by Raynette N.Y. Ching of HDA include labeling deficiencies or misleading statements because the first aid



section states that if “poisoning occurs, contact a doctor or Poisons Information Center, phone 131126.” This direction is inherently misleading because it directs a person seeking medical attention to a telephone number that does not work in the United States and therefore is a misbranding within the meaning of 7 U.S.C. § 136(q)(1)(A).

The Acworth Feed samples are misbranded because the boxes refer to the labels which provide in kilograms, not pounds, the weight of the dog for which the product is intended. OPP has stated that such labeling may be dangerous because “the product is highly likely to be misapplied, resulting in harm to the treated dog.” Exhibit I at 2. On the other hand, Respondent, in the April 22, 2005 letter, contends that the metric system is a valid unit of measurement. While Respondent’s assertion is accurate, labeling regulations clearly require that liquid pesticides be expressed in American units of fluid ounces, pints, quarts and gallons (*supra* note 6). According to Complainant, directing a person to use a certain product based on the metric system may lead to applying an incorrect dose and prevent effectuating the purpose for which the product is intended. See 7 U.S.C. § 136(q)(1)(F). Moreover, Complainant alleges that application of an incorrect dose may have a dangerous effect on health and the environment. *Id.* Therefore, Acworth Feed samples of Frontline Spot on Dog (0-10 kg.), Frontline Spot on Dog (10-20 kg.), Frontline Spot on Dog (20-40 kg.), and Frontline Spot on Dog (40-60 kg.) are misbranded because net content of the product is delineated in milliliters.

**5. FIFRA § 12 is Entitled “Unlawful acts” and, the Violations Alleged, Sale or Distribution of Unregistered and Misbranded Pesticides Contrary to FIFRA §§ 12(a)(1)(A) and 12(a)(1)(E), Are Dependent Violations To The Extent The Violations Are Based On The Identical Sales Or Distributions.**

In *McLaughlin Gormley King Co.*, FIFRA Appeal Nos. 95-2 through 95-7, 6 E.A.D. 339 (EAB 1996), which involved FIFRA § 12(a)(2)(Q), making it unlawful to falsify all or part of any information submitted to the Agency relating to the testing of any pesticide, the Environmental Appeals Board (“EAB”) held that determining the unit or number of violations was essentially a matter of statutory construction. In that case, respondent had, in accordance with EPA regulations, submitted a compliance statement certifying that tests, which generated data used to support a registration were conducted in accordance with Good Laboratory Practice Standards (“GLPS”), 40 C.F.R. Part 160. The tests conducted allegedly deviated from GLPS in several respects and upon the Agency’s attempt to measure the number of violations of FIFRA § 12(a)(2)(Q), and thus the number of offenses for which a penalty could be assessed under FIFRA § 14(a)(1), by the number of deviations from GLPS, the EAB held that the unit of violations, i.e., the information falsified, was the compliance statement and that the number of deviations from GLPS was not relevant.

FIFRA § 12 is entitled “**Unlawful acts**” and provides in pertinent part:

**(a) In general**

- (1) Except as provided by subsection (b) of this section, it shall be unlawful for any Person in any State to distribute or sell to any person—

(A) **any pesticide that is not** registered under section 136(a) of this title, or whose registration has been canceled or suspended, except to the extent that the distribution or sale has been authorized by the Administrator under this subchapter.

.....

(E) any pesticide which is adulterated or misbranded; or

(F) any device which is misbranded.

From the quoted language, it is evident that the unlawful act is the “sale” or “distribution” of a pesticide which is within the listing in § 12(a)(1)(A) through § 12(a)(1)(F). See, e.g., *Microban Products Company*, FIFRA Appeal No. 99-12, 9 E.A.D. 674, 2001 WL 221611 (EAB, 2001) (it is manifest that Congress intended the unit of violation to be the statutorily defined act to “distribute or sell”). The triggering act is the sale or distribution of a pesticide and the fact that the sale or distribution may be unlawful for several reasons does not increase the number of sales or distributions which is the only basis upon which a penalty may be assessed. This conclusion is supported by the fact the conjunctive “or” separates the cited listing of unlawful acts. Moreover, there is no basis for dividing a single sale or distribution into separate components for the purpose of increasing the number of penalties.

*The Enforcement Response Policy* (“ERP”) for FIFRA (July 2, 1990) defines an independent violation as one resulting from an act (or failure to act) which is not the result of any other charge for which a penalty is to be assessed, or if the elements of proof are different (id. 25). The ERP provides that dependent violations may be charged in the complaint, but will not result in separate civil penalties. The violations alleged here, the sale or distribution of an unregistered pesticide and the sale or distribution of a misbranded pesticide are dependent, because the foundation of the violations are the identical sales or distributions. It is recognized that there are holdings to the contrary. See e.g. *Avril, Inc.*, Docket No. I.F.& R. III-441-C, 1997 EPA ALJ LEXIS 176 (March 24, 1997), cited by Complainant. “The violations of selling an unregistered pesticide and of selling a pesticide that is misbranded are not dependent on each other and may properly be charged separately for each shipment” (Slip Opinion at 11). See also *Aquarium Products, Inc.*, I.F. & R Docket No. 111-439-C, 1995 EPA ALJ LEXIS 87 (June 30, 1997), citing ERP in holding that it was a matter of prosecutorial discretion whether the sale or distribution of a single pesticide which was not registered and also misbranded *would be treated as one violation or two*. These decisions fail to recognize that the unit of violation is the sale or distribution of a pesticide and will not be followed.

## VI. Order

1. Complainant’s Motion for Accelerated Decision as to violations of FIFRA Section 12(a)(1)(A), sale or distribution of an unregistered pesticide, is denied.
2. Complainant’s Motion for Accelerated Decision as to violations of FIFRA Section 12(a)(1)(E), sale or distribution of a pesticide which is adulterated or misbranded, is granted.
3. Complainant’s contention that it may assess a penalty for both sale or distribution of

an unregistered pesticide and for the sale or distribution or of a misbranded pesticide for the identical distribution or sale of the same pesticide is, however, rejected. This conclusion does not require Complainant to amend the complaint to reduce the number of charges, but does require that for each distribution or sale Complainant elect whether to claim a penalty for the distribution or sale of an unregistered pesticide or of a misbranded pesticide as it may not do both.

Dated this 1<sup>st</sup> day of February, 2006.

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Spencer T. Nissen  
Administrative Law Judge